**IN THE HIGH COURT OF UTTARANCHAL**
**AT NAINITAL**
**Criminal Jail Appeal No. 264 of 2002**

Mohan Chandra .. Appellant

Versus

State .. Respondent

Sri Lokendra Dobhal & Ms. Nishat Intezar learned counsel for the appellant
Learned A.G.A. learned counsel for the respondent

**Hon'ble B.C. Kandpal, J.**

This is a criminal jail appeal arising out against the judgment and order dated 18.06.2002 passed by Ist Additional Sessions Judge/First F.T.C., Nainital in special sessions trial No. 25 of 2000 State Vs. Mohan Chandra Padliya punishable under Section 20 of the N.D.P.S. Act, P.S. Bhimtal District Nainital.

Brief facts of the case are that a complaint was filed by Excise Inspector Sector – 1 District Nainital before the Court against the accused Mohan Chandra Padliya and thereafter he was tried by the court below for the aforesaid offence.

As per the complaint, the prosecution story runs as follows:-

> "On 15.06.2000 at about 11:15 a.m. Sri S.C. Gupta, Excise Inspector had received an information from an unknown person on telephone that accused – Mohan Chandra is in possession of charas in his house. On receiving this information the Excise Inspector intimated to Sri. C.L. Mishra - Deputy Excise Commissioner (Kumoun Range) who issued the direction to collect the personnels of the Department and also

directed that all the persons shall meet at Ranibagh crossing at 1:30 p.m.

Sri S.C. Gupta – Excise Inspector along with other personnels of the Department went on Government jeep for raid. Deputy Excise Commissioner was also there in the raiding party. At 01:30 p.m. other personnels of the Department also accompanied the raiding party at the tea stall of Umesh Chand in the village Barjala. The raiding party took Umesh Chand with them and proceeded towards Gram Bhorsa. On the way Sri Lalit Mohan Goswami – Patwari met the raiding party hence he also joined them.

When the raiding party reached near Bhorsa village then they asked Bhuwan Chandra Pandey about the house of Mohan Chandra Padliya. The raiding party thereafter reached at the house of accused Mohan Chandra Padliya at 2:15 p.m. Mohan Chandra Padliya was sitting in the courtyard of his house. The accused was interrogated by Deputy Excise Commissioner and on his search a key from his pocket was recovered and from that key a box kept inside the house was opened and the raiding party recovered lots of charus kept in 3 plastic bags and a sum of Rs. 7760/- kept inside the box which was received out of the sale of charas. The total quantity of charas recovered at the spot was found 3.200 kg. All the persons of the raiding party got themselves satisfied that it was charas. Hence two samples from the recovered charas were taken separately and rest of the charas again kept inside the box and sealed.

The recovery memo was prepared at the spot and all the personnels including Deputy Excise Commissioner and the public witnesses put their signatures on the memo. Signature of the accused was also obtained on the recovery memo. Thereafter the accused was taken into custody and then given in the custody of police – Police Station Mallital. On the next day the accused was produced before the court and the sample taken was sent to Public Analysis Laboratory. The report of the Public Analysis was received and the sample was found to be charas. Hence, the complaint was filed before the court against the accused Mohan Chandra Padliya.

The trial court framed the charge under Section 20 N.D.P.S. Act against the accused Mohan Chandra Padliya on 03.05.2001. The accused denied all the charges leveled against him and claimed the trial.

The prosecution in order to support its case produced P.W. 1 – Sri Satish Chandra Gupta, Excise Inspector, P.W. 2 Sri Bhuwan Chandra Padliya, P.W. 3 – Sri Umesh Chandra, P.W. 4 – Sri Lalit Mohan Goswami and P.W. 5 – Sri C.L. Mishra Deputy Excise Commissioner. The prosecution also produced the documents in recovery memo, site plan, letter by which the contraband article was kept in malkhana, report of the public analyst etc.

The accused did not adduce any witness in his defence.

The trial court after having perused the entire evidence and hearing the learned counsel for the

prosecution as well as the defence, convicted the accused under Section 20 N.D.P.C. Act and sentenced him 10 years R.I. as well as a fine of Rs. 1,00,000/- (Rupees One lakh only) and in default of fine further imprisonment R.I. for 4 years, vide judgment and order dated 18.06.2002."

Feeling aggrieved by the aforesaid judgment and order, the convict Mohan Chandra Padliya filed the appeal before this Court, which has been placed before me for final disposal.

Heard the learned counsel for the appellant, the learned A.G.A. and perused the record.

Learned counsel for the appellant first of all argued before me that in the instant case the provision of Section 42 N.D.P.C. Act have not been followed hence, on account of non compliance of the aforesaid provision, the entire prosecution case comes within the ambit of doubt, with the result the trial vitiates.

Learned counsel for the appellant has invited my attention towards the statement of P.W.-1 Sri Satish Chandra Gupta, Excise Inspector who has deposed therein that on having this information that the accused was in possession of charas and is involved in the trade of illicit drugs, he immediately informed his superior i.e. Deputy Excise Commissioner and thereafter proceeded for raid at the house of the accused. The statement of P.W. 5 – Deputy Excise Commissioner that shows at the time of occurrence, he led the raiding party and the search and seizure was made in his presence.

Learned counsel for the appellant has cited several decisions in order to show that on account of non compliance of the provision of Section 42 of the N.D.P.C. Act, the trial stands vitiated. He has cited before me following decision:-

*a)* ***2003 SCC (Criminal) page 1194 Chunna @ Mehtab Vs. State of M.P.***

I have carefully gone through the judgment cited before me and I find that the facts in the judgment cited before me are that the raid was conducted by the police party and the police party before the search of the premises did not obtain the search warrants while in the instant case the facts are absolutely different, as it is not a case in which the raid was made by the police party. In this case, the Gazetted Officer of the Excise Department had led the raiding party and search and seizure was conducted in his presence at the spot.

Learned counsel for the appellant has further cited before me ***2002 (45) ACC page 311 (Supreme Court) State of Orissa Vs. Laxman Jena*** and ***2000(43) ACC page 470 Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat.***

Perusal of the aforesaid judgments again reveal that the same are not going to provide any help to the appellant as these cases relates to the proviso 42(1). While in the instant case, it was not necessary for the Deputy Excise Commissioner to obtain any search warrant before raiding the premises of the accused.

In the instant case the specific question was put to P.W. 5 Sri C.L. Mishra – Deputy Excise Commissioner, by the defence and he stated that he did not obtain conducting search warrant for conducting search and seizure because he was authorized to conduct search and seizure without obtaining search warrant. Again this witness has replied to the court question that he was Class-I Gazetted Officer at the time of the search and seizure.

In construing any facts to find, whether prosecution has complied with the mandate of any provision which is

mandatory, one has to examine it with pragmatic approach. The law under the aforesaid Act being stringent to the persons involved in the filed of illicit drugs, traffic and drug abuse, the Legislature time and again has made some of its provisions obligatory for the prosecution to comply, which the courts have interpreted it to be mandatory. This is in order to balance the stringency of an accused by casting and obligation on the prosecution for its strict compliance. The stringency is because of the type of crime involved under it, so that no person escapes from the clutches of law.

The Hon'ble Supreme court in a case reported in **2001 (43) ACC 528 Sajan Abraham Vs. State of Kerala** has clearly observed that the "the Court, however, while construing such provisions strictly should not interpret it so literally so as to render its compliance, impossible. However, before drawing such an inference, it should be examined with the caution and circumspection. In other words, if in a case, the following of mandate strictly, results in delay in trapping an accused, which may lead the accused to escape, then prosecution case should not be thrown out."

In the instant case the distance of the place of occurrence from Nainital is 48 KM as is evident from the statement of P.W. 1. This witness has also deposed that he had already informed to his superior officer i.e. Deputy Excise Commissioner on telephone and also obtained the oral directions to raid the spot. This witness has further stated that the Deputy Excise Commissioner also accompanied the raiding party.

In view of the facts stated above, in case, if the judgment delivered by the Apex Court, in the case of **M. Prabhulal Vs.**

**Assistant Director, Directorate of Revenue Intelligence reported in 2003 Supreme Court Cases (Criminal) 2024** is perused then it becomes quite clear that Section 42 (2) would not be applicable when search, seizure etc. is conducted by a Gazetted Officer under Section 41(2) and (3).

The Apex Court has observed in the judgment cited above as follows:-

> *"It is clear from Section 41(2) that the Central Government or State Government, as the case may be, can only empower an officer of a gazetted rank who can either himself act or authorize his subordinate on the terms stated in the section. Under sub-section (1) of Section 42, however, there is no restriction on the Central Government or the State Government to empower only a Gazetted Officer. But on an officer empowered under sub-section (1) of section 42, there are additional checks and balances as provided in the proviso and also provided in sub-section (2) of Section 42. It is clear from the language of sub-section (2) of Section 42 that it applies to an officer contemplated by sub-section (2) thereof and not to a Gazetted Officer contemplated by sub-section (2) of Section 41, when such a Gazetted Officer himself makes an arrest or conducts search and seizure.*
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> *It can, thus, be seen that Sections 42 and 43 do not require an officer to be a Gazetted Officer whereas Section 41(2) requires an officer to be so. A Gazetted Officer has been differently dealt with and more trust has been reposed in him can also be seen from Section 50 N.D.P.S. Act which gives a right to a person about to be*

*searched to ask for being searched in the presence of a Gazetted Officer."*

The Hon'ble Apex Court while dealing with the case cited in the decision mentioned above has clearly distinguished the cases decided earlier by the Hon'ble Apex court on this point.

Moreover, the Apex Court in the case of Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat (Supra) has observed in paragraph 17 of the judgment that "the trial may not be vitiated on the score of non-compliance of Section 42 alone. Nonetheless the resultant position would be one of causing prejudice to the accused."

Learned counsel for the appellant has further argued that the provision of Section 50 N.D.P.S. Act have not been complied with in the instant case.

I don't find any force in the argument advanced by the learned counsel for the appellant in this regard. The ruling cited by the learned counsel for the appellant in support of his submission **{2002 (44) ACC page 780 State of Haryana Vs. Vikram Singh}** does not help the appellant as the facts in the cited case are that where the offer to get search before a Gazetted Officer could not be established by any documentary evidence by the prosecution relied upon oral evidence only with regard to the factum of offer of search and the witnesses examined in this regard turned hostile. Hence the court came to the conclusion that the search and seizure was not proved.

While in the instant case, the position is not like that as the search and seizure in the instant case was made by the Deputy Excise Commissioner who was Gazetted Officer. P.W.-1 has deposed in his cross-examination that the accused

had been informed that the search was being made before the Gazetted Officer. Again P.W.5 Sri C.L. Mishra – Deputy Excise Commissioner has also deposed that during then entire proceedings search and seizure he remained at the spot and he also put his signature over the recovery memo.

I am, therefore, of the view that the appellant by way of any stretch of evidence could not establish that the trial vitiated on account of Section 42 as well as 50 of the N.D.P.C. Act.

The statement of the witnesses produced by the prosecution have supported the case with regard to the recovery of large quantity of contraband. It is true that the independent witnesses produced by the prosecution have turned hostile but the same is not going to discard the prosecution case. It is quite clear from the perusal of the record that the appellant was very much present through out at the spot from where the contraband was recovered and there as no allegation or suggestion that the contraband article was in any way muddled with by the Officer/official of Excise Department.

Therefore, in my view, on the facts of the case, there is no illegality in the search of the contraband either on account of the independent witnesses being hostile.

On the basis of the assessment of the evidence on record, I come to the conclusion that the prosecution has established the guilt of the appellant beyond reasonable doubt.

I do not find any illegality or infirmity in the impugned judgment and order passed by the court below. To my mind the appellant has been rightly convicted by the court below for having committed the offence under Section 20 of the N.D.P.S. Act. The recovery of the contraband from the possession of the accused cannot be doubted in any case.

For the reasons stated above I come to the conclusion that the impugned order passed by the court below cannot be faulted thus sustaining the conviction of the appellant the appeal is liable to be dismissed.

The appeal is accordingly dismissed. The judgment and order passed by the court below is confirmed.

August 12th, 2004 **(B.C. Kandpal, J.)**
ASWAL